



Commonwealth of Massachusetts State Ethics Commission

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CONFLICT OF INTEREST OPINION EC-COI-90-9

FACTS:

You are an appointed head of a public agency (ABC). Your official duties include supervising departments and employees within ABC. You also are responsible for setting policies and guidelines for certain ABC contracts, and your office gives final approval to those vendor contracts. The ABC vendors are selected by ABC departments pursuant to a contract bid process without assistance from your office. You have direct responsibility, however, for the budget allocation for these vendors and for the audit of these contracts.

You wish to be an unpaid advisor during your off hours to a candidate for public office. You wish to provide advice to the candidate. You state this role would not entail fundraising or use of public resources. You would not solicit participation in the campaign from ABC vendors.

QUESTIONS:

- 1 May you sign a letter of endorsement for the candidate?
- 2 May you invite ABC vendors to meetings with the candidate?
- 3 May you invite these vendors to render advice to the candidate?
- 4 May you participate in meetings with the candidate when ABC vendors are present?

ANSWERS:

1. Yes, as discussed below.
- 2, 3, 4. No, pursuant to the limitations discussed below.

DISCUSSION:

1. General Discussion of G.L. c. 268A, §23.

As the head of ABC you are considered a "public employee" for the purposes of the conflict law, G.L. c. 268A. The issue of political activity of public employees has been addressed by the Commission in Commission Advisory No. 4. That advisory, issued in 1984, summarizes the applicability of the conflict law to public employees' conduct or participation in political campaigns.^{1/} Section 23, the standards of conduct section to the conflict law, contains supplemental provisions which apply to all state, county and municipal employees. These provisions are intended to set standards for public employees' conduct which is not covered by other sections of c. 268A. Section 23 is relevant to your questions.

Section 23(b)(2),^{2/} prohibits a state, county, or municipal employee, knowingly or with reason to know, from using or attempting to use his official position to secure for himself or others unwarranted privileges or exemptions which are of substantial value and which are not properly available to similarly situated individuals. The Commission has interpreted an item of substantial value to be anything valued at \$50 or more. See generally, Commission Advisory No. 8, This section, for instance, prohibits you from using ABC staff, equipment and time to further your personal or private interests, including work on a political campaign. See, EC-COI-82-51; 82-61; Public Enforcement Letter 78-1. In addition, the Commission has concluded that a

public employee's use of his official position to promote political or campaign related matters is unwarranted where such political activity falls outside the scope of his official duties. See, EC-COI-85-29 (general court member's use of a student intern to perform tasks that would predominantly benefit his political committee and his reelection effort exceeds the customary use of his office and, therefore, is unwarranted); EC-COI-82-112 (general court member's placement of a word processor in his state house office for purely personal or campaign purposes would be an unwarranted privilege arising from his official position); 84-127 (use of judge's name to promote a commercial product exceeds the customary conduct of his official position and has a private rather than a public benefit).

The use of official stationery or official title by a public employee to endorse or promote a private interest has also deemed to be an unwarranted use of an official's position. See, P.E.L. 89-4 (state employee's use of official stationery and state resources in an attempt to promote a private trip which would result in a free trip for himself and possibly another individual was an unwarranted use of official position in addition to presenting an unwarranted appearance of state sponsorship or endorsement). See also, In the Matter of Elizabeth Buckley, 1986 SEC 137; EC-COI-84-44; 83-82.

Conversely, if the use of an official's position is considered within the customary or accepted conduct of his official position, an endorsement or promotion is not unwarranted.^{3/} See, EC-COI-83-102 (general court member's signing of a letter soliciting prizes from merchants for a contest to promote a voter registration drive is permissible activity for legislators); EC-COI-84-128 (state agency secretary may solicit private contributions to fund a state-wide public service program to publicize the use of drugs and alcohol in the public schools and programs addressing those problems where his state office had limited authority over the private donors, the activity could reasonably be seen as part of his official duties and a public rather than a private interest would, be served).

Section 23(b)(3), on the other hand, addresses situations involving the appearance of conflict by a state, county or municipal employee. That provision specifically prohibits you from acting in a manner which would cause a reasonable person, knowing the relevant circumstances, to conclude that any person can improperly influence or unduly enjoy your favor in the performance of your official duties, or that you are likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person. For example, under the questions you have presented, you would run afoul of this provision if a reasonable person could conclude that your simultaneous public and private relationships with ABC vendors creates the appearance of favoritism. See, In the Matter of George Keverian, Commission Adjudicatory Docket No. 385 (Disposition Agreement, April 29, 1990). An exemption from this provision is available, however, if you disclose in writing to your appointing authority the facts which would dispel the appearance of a conflict.

2. Application of §23 to you

In accordance with the principles of §23(b)(2) as articulated above, you may not use your official position to sign a letter of endorsement for a political candidate using your official title or official stationery. You may, however, send a letter expressing your personal viewpoint in support of the candidate if the letter is privately funded, on private stationery, without the use of your official title or position. In addition, the text of the letter must not contain a solicitation, nor request a recipient who is subject to your official position to respond to or answer the letter in any way. Furthermore, under §23(b)(3), it is advisable for you to disclose to your appointing authority a copy of the letter with a description of the intended audience.

Your questions, under 2, 3 and 4, however, present somewhat different concerns under §23. Each of these questions involves your direct contact with ABC vendors creating concerns that your private activity may produce a potentially coercive or exploitative situation because of the official regulatory and budgetary role you occupy over those individuals. In Compliance Letter 82-2, similar circumstances were considered by the Commission. The course of conduct by former Boston Mayor White, involving the direct and indirect solicitation of monetary gifts from vendors and employees subject to his official authority, was deemed to have violated §23(d) and (e) [former versions of §23(b)(2) and (b)(3)]. In its findings, the Commission specifically noted the implicit pressure placed on subordinates and vendors of the Mayor by the fundraising efforts.^{4/} ^{5/}

The Commission has reviewed other situations which have been found under §23 to involve inherently coercive or exploitative circumstances. See, EC-COI-81-66 (state employee's circulation of a catalog to individuals subject to his official control was an unwarranted advantage under §23(d) because of the potentially coercive atmosphere created by the employee's unique official relationship to the catalog purchasers); EC-COI-82-64 (state employee's private business solicitations, directed to persons subject to his official authority, placed inherent pressure on those subordinates resulting in an unwarranted privilege arising from his official position). These opinions strongly suggest that a public employee must avoid making private solicitations of individuals who are dependent on or subject to that employee's official actions.

In light of these considerations, we conclude that §23(b)(2) prohibits your proposed activity under Questions 2, 3 and 4. We find that because of your unique regulatory role over vendors in your ABC position, your invitations to and personal interaction with ABC vendors in a political campaign setting could place pressure on those vendors to respond to you. This would result in an unwarranted privilege not available to other similar candidates. Your primary contact with ABC vendors devolves from your position as head of ABC and not from other circumstances. Therefore, under §23(b)(2) you must refrain from any campaign activity which directly or indirectly, implicitly or explicitly, obligates ABC vendors to respond to you in writing or in person.^{6/} This prohibition, in accordance with the purpose of c. 268A, is intended to preclude circumstances creating actual or potential conflicts of interest.^{7/} In other words, if you have reason to know that ABC vendors will be present at a campaign meeting, the safest course of conduct would be for you not to attend that meeting. By choosing this option, you will avoid all situations leading to an inadvertent violation of §23.^{8/} This is not to say that c. 268A prohibits your involvement in political activities but, rather, that your activities on behalf of the candidate or campaign must not involve your requests for responses from parties who are dependent on your official actions. You may not actually use or appear to use your official position in connection with such private activity. See, EC-COI-82-51; 82-124.^{9/}

DATE AUTHORIZED: August 1, 1990

¹ Section 23(e) provides that the head of a public agency may establish and enforce additional standards of conduct. You may wish to determine whether any agency policy on political activity is relevant to your circumstances.

² As amended by Chapter 12, Acts of 1986.

³ In determining the scope of a public employee's responsibilities, the Commission typically looks for a statutory basis or other legal definition relating to that individual's official position. See, EC-COI-89-7 (cabinet secretary's official responsibility defined by statute); 89-26 (state employee's official responsibility found in statute); 84-48 (town by-law authorized selectmen to defend or settle lawsuits). Where no legal

basis exists to determine whether an activity falls within customary or accepted conduct of a public employee's position, the Commission will traditionally defer judgment on that matter to that employee's appointing authority unless to do so would be unreasonable or would otherwise frustrate the purposes of c. 268A. See, EC-COI-89-25 (Commission deferred to general counsel's opinion as to state employee's duties); 88-17 (state employee's duties did not include board position in an organization); 88-10 (deference given to school committee's interpretation of teacher's job under collective bargaining agreement); 83-137 (appointing official's discretion in determining official duties of public employee is not unlimited [citations omitted]).

⁴ In finding the existence of affirmative obligations placed on Mayor White by §23(d) and (e), the Commission stated:

No public official who controls the jobs of large numbers of employees and the awarding of important contracts with vendors can permit a large event to be planned that will raise money for him or any members of his family without making every reasonable effort to insure that there is neither direct solicitation of these employees or vendors nor pressure, either implicit or explicit on such employees or vendors to attend and contribute. In addition, public officials must instruct those planning such an event that even unsolicited contributions from employees or vendors should not be accepted unless the circumstances make it clear that family or personal relationships are the motivating factors. *Id.* at p. 83.

⁵ Compliance Letter 82-2 noted that legitimate fundraisers are regulated by G.L. c. 55.

⁶ For the purposes of your opinion request, we will assume that your proposed solicitation would constitute something of substantial value for your candidate. See, *In the Matter of William A. Burke, Jr.*, 1985 SEC 248, affirmed, *William A. Burke, Jr. v. State Ethics Commission*, Suffolk Superior Court Civil Action No. 79226 (November 15, 1988).

⁷ See, *LaBarge v. Chief Administrative Justice*, 402 Mass. 462, 466-467 (1988) citing *Edgartown v. State Ethics Commission*, 391 Mass. 83, 89 (1984).

⁸ This advice is not intended to abridge your freedom to associate with others for political purposes. Nonetheless, we recognize that under certain circumstances your participation in meetings with ABC vendors may inevitably be construed as coercive. The high degree of official responsibility you possess as head of ABC creates a potentially greater risk of pressure over ABC vendors which in turn justifies a preventative application of §23(b)(2).

⁹ Section 23(e) provides that the head of a public agency may establish and enforce additional standards of conduct. You may wish to determine whether any agency policy on political activity is relevant to your circumstances.